

IN THE
Supreme Court of the United States

October Term—1943.

268
No.

THE 18TH STREET LEADER STORES, INC.,
Petitioner,
vs.
THE UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States
Circuit Court of Appeals for the Seventh Circuit
and Brief in Support of Petition.

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INDEX.

	PAGE
Petition for Writ of Certiorari	1
Summary Statement of Matter Involved	1
Jurisdictional Statement	3
Questions Presented	3
Reasons Relied on for Allowance of Writ	3
Prayer for Writ	7
Brief in Support of Petition for Writ	8
Opinions of Courts Below	8
Jurisdiction	8
Statement of Case	11
Specification of Errors	11
Argument	12
Summary of Argument	12
POINT I.—The Circuit Court's decision is in direct conflict with the decisions of the First Circuit, Court of Claims, and District Courts in other circuits on the question as to whether a claim for refund, filed after a first claim for refund has been wholly rejected by the Commissioner of Internal Revenue, without consideration of the merits thereof but before the statutory period for filing claims has expired, is a new claim or a duplicate of the first claim	13
POINT II.—The Circuit Court's decision is in direct conflict with the decisions of the Third Circuit and District Courts in other circuits on the question as to whether Sections 902	

and 903 of the Revenue Act of 1936 and Regulations 96 require the submission of evidence to the Commissioner of Internal Revenue in support of a claim for refund of taxes paid under the Agricultural Adjustment Act of 1933	16
POINT III.—An important and substantial question of Federal Law is involved which has not been and should be settled by the Supreme Court	22
Appendix	27

TABLE OF CASES CITED.

Bethlehem Baking Co. v. U. S., 129 F. (2d) 490 (C. A. 3rd, 1942)	4, 10, 16
Bricker Baking Co. v. Rothensies et al., 46 Fed. Supp. 742 (E. D. Pa. 1942)	5, 10, 18
Bullock's Inc. v. U. S., 43 Fed. Supp. 861 (S. D. Calif. 1941)	5, 10, 18
Detroit Trust Co. v. U. S., 18 Fed. Supp. 776 (Court of Claims 1937)	4, 9, 15
Dinon v. U. S., 37-1 U. S. T. C. 9149 (E. D. Pa. 1936)	4, 10, 15
Fidelity & Columbia Trust Co. v. Lucas, 7 F. (2d) 146 (D. C. Ky. 1925)	6, 10, 21
First Nat. Pictures v. U. S., 32 Fed. Supp. 138 (Court of Claims 1940)	4, 9, 14
Hutzler Bros. v. U. S., 33 Fed. Supp. 801 (D. C. Md. 1940)	5, 10, 17
Joe Hanna v. U. S., 27 AFTR 1135 (W. D. Texas 1940)	5, 10, 18

	PAGE
Ney et al. v. U. S., 33 Fed. Supp. 554 (W. D. Va. 1940)	5, 10, 18
New York Handkerchief Mfg. Co. v. The United States of America, 44 U. S. T. C. 9295, decided April 25, 1944	21, 22
Pacific Mills v. Nichols, 72 F. (2d) 103 (C. C. A. 1st, 1934)	4, 9, 13
Paul Jones & Co. v. Lucas, 33 F. (2d) 907 (D. C. Ky. 1929) Affirmed 64 F. (2d) 1016 (C. C. A. 6th, 1933)	5, 10, 20, 21
Snead, Collector v. F. H. Elmore, 59 F. (2d) 312 (C. C. A. 5th, 1932)	5, 10, 20
Stephenson v. Woodworth, 39-1 U. S. T. C. 9469 (E. D. Mich. 1929)	4, 10, 15
Sun-Herald Corp. v. Duggan, 15 Fed. Supp. 415 (S. D. N. Y. 1936)	4, 10, 15
Williams et al. v. U. S., 48 Fed. Supp. 647 (Court of Claims, 1943, cert. den. Oct. 11, 1943)	4, 10, 15

TABLE OF STATUTES CITED.

Act of February 13, 1925 (C. 229; 43 Stat. 938) amending the Judicial Code, Section 240, Title 28 U. S. C. A. Section 347	3, 8
Agricultural Adjustment Act of 1933 (48 Stat. 31)	5, 8
Congressional Committee Report on the Revenue Act of 1936 (C. B. 1939-1, Part 2)	6, 19
Internal Revenue Code Section 3774	3, 11
Regulations 96	3, 11, 21
Rules of the Supreme Court, Rule 38 (sub-division [5])	3, 8
Section 902 of the Revenue Act of 1936	3, 11
Section 903 of the Revenue Act of 1936	3, 11, 21
Section 904 of the Revenue Act of 1936	3, 11, 16

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**Petition for Writ of Certiorari to the United States Circuit
Court of Appeals for the Seventh Circuit and
Brief in Support of Petition.**

*To the Honorable Harlan F. Stone, Chief Justice of the
United States and the Associate Justices of the Su-
preme Court of the United States:*

Your Petitioner respectfully shows:

Summary Statement of Matter Involved.

A judgment dismissing petitioner's complaint was entered by the District Court of the United States for the Northern District of Illinois, Eastern Division on January 4, 1943 (R. p. 37). Said judgment was affirmed by the United States Circuit Court of Appeals for the Seventh Circuit on May 3, 1944 (R. p. 51). Petitioner prays that a writ of certiorari issue to review said judgment.

On December 9, 1936, petitioner filed with the office of the Collector of Internal Revenue, First District of Illinois, a claim for the refund of \$2,218.32 paid as floor stocks taxes under the provisions of the Agricultural Adjustment Act of 1933 (R. pp. 7-13). On May 17, 1938, petitioner was notified that its claim for refund had been rejected and that the Commissioner of Internal Revenue was without authority to consider the claim on the ground that petitioner had not submitted evidence sufficient to establish that the petitioner had borne the burden of the taxes, refund of which was claimed (R. pp. 23-24).

Petitioner filed a new claim for refund of the same amount on December 31, 1939 (R. pp. 25-31) with four affidavits attached (R. pp. 32-35). On June 21, 1940 plaintiff was notified that this claim for refund had been rejected on the ground that said claim for refund was a duplicate of a prior claim filed December 9, 1936 and rejected May 17, 1938, and that Article 302 of Regulations 96 provides that only one claim shall be filed for refund of floor stocks taxes; that action on the claim of December 9, 1936 had become final, since the statute of limitations for filing suit prescribed in Section 904 (two years from mailing of the notice of disallowance), had expired; and that any refund is now barred by Section 3774 of the Internal Revenue Code (48 Stat. 756) (R. p. 36).

On June 20, 1942, petitioner instituted suit in the United States District Court for the refund of the floor stocks taxes paid as aforesaid (R. pp. 2-3). The respondent moved to dismiss the complaint on the ground that the Court was without jurisdiction to hear and determine upon the merits of the matters alleged in the complaint for the reasons that (1) contrary to the provisions of Sections 902 and 903 of the Revenue Act of 1936 (49 Stat. 1648), and Regulations 96, plaintiff did

not file a proper claim for refund and did not submit evidence to the Commissioner of Internal Revenue to prove that it bore the burden of the taxes and (2) contrary to the provisions of Section 904 of the Revenue Act of 1936 and Regulations 96, the complaint was filed more than two years after the date of mailing of the notice of disallowance of the claim for refund of the taxes sought to be recovered in this action.

The District Court granted the motion to dismiss, without opinion (R. p. 37). The Circuit Court affirmed the judgment of the District Court (R. p. 51).

Jurisdictional Statement.

It is contended that the Supreme Court has jurisdiction to review the judgment here in question under the Act of February 13, 1925 (C. 229; 43 Stat. 938) amending the Judicial Code, Section 240, Title 28 U. S. C. A., Section 347, and under Rule 38, sub-division (5) of the Rules of the Supreme Court.

Questions Presented.

1. Was the action barred by Section 904 of the Revenue Act of 1936 (49 Stat. 1648) and Regulations 96; is refund barred by Section 3774 of the Internal Revenue Code (48 Stat. 756)?

2. Does petitioner's claim for refund comply with Sections 902 and 903 of the Revenue Act of 1936 (49 Stat. 1648), and Regulations 96; does the District Court have jurisdiction of the action?

Reasons Relied on for Allowance of Writ.

1. The decision of the Circuit Court of Appeals for the Seventh Circuit in the within matter is in direct

conflict with the decision of the Circuit Court of Appeals for the First Circuit, in the case of *Pacific Mills v. Nichols*, 72 F. (2d) 103 (C. C. A. 1st, 1934). The latter case also dealt with the question as to whether a taxpayer after rejection of his claim for refund, without any consideration thereof by the Commissioner of Internal Revenue, may wholly abandon said claim and file a new claim so long as the statute of limitations had not run on the filing of claims.

The instant decision is also in conflict with the following decisions of the United States Court of Claims and the United States District Courts in the Second, Third and Sixth Circuits involving the same issues:

- First Nat. Pictures v. U. S.*, 32 Fed. Supp. 138 (Court of Claims 1940);
- Detroit Trust Co. v. U. S.*, 18 Fed. Supp. 776 (Court of Claims 1937);
- Williams v. U. S.*, 48 Fed. Supp. 647 (Court of Claims, 1943, cert. den. Oct. 11, 1943);
- Sun-Herald Corporation v. Duggan*, 15 Fed. Supp. 415 (S. D. N. Y. 1936);
- Dinon v. U. S.*, 37-1 U. S. T. C. 9149 (E. D. Pa. 1936);
- Stephenson v. Woodworth*, 39-1 U. S. T. C. 9469 (E. D. Mich. 1929).

The instant decision is also in conflict with *L. O. 1116 of the Solicitor of Internal Revenue*, C. B. III p. 350 (1924).

2. The decision of the Circuit Court of Appeals for the Seventh Circuit in the within matter is in direct conflict with the decision of the Circuit Court of Appeals for the Third Circuit in the case of *Bethlehem Baking*

Co. v. U. S., 129 F. (2d) 490 (C. C. A. 3rd, 1942). The latter case also involved a claim for refund under Title VII of the Revenue Act of 1936 of taxes paid under the Agricultural Adjustment Act of 1933 (48 Stat. 31) and dealt with the question as to whether a claim for refund submitted to the Commissioner must be substantiated by evidence.

The instant decision is also in conflict with the following decisions of United States District Courts in the Third, Fourth, Fifth and Ninth Circuits:

Hutzler Bros. v. U. S., 33 Fed. Supp. 801 (D. C. Md. 1940);

Bullock's Inc. v. U. S., 43 Fed. Supp. 861 (S. D. Calif. 1941);

Ney, et al. v. U. S., 33 Fed. Supp. 554 (W. D. Va. 1940);

Joe Hanna v. U. S., 27 AFTR 1135 (W. D. Texas 1940);

Bricker Baking Co. v. Rothensies, et al., 46 Fed. Supp. 742 (E. D. Pa. 1942).

The decision of the Circuit Court of Appeals for the Seventh Circuit in the within matter is likewise in direct conflict with the following decisions of the Circuit Court of Appeals for the Fifth and Sixth Circuits:

Snead, Collector v. F. H. Elmore, 59 F. (2d) 312 (C. C. A. 5th, 1938) (26 U. S. C. A. 156; Reg. 45, Art. 1036);

Paul Jones & Co. v. Lucas, 33 F. (2d) 907 (D. C. Ky. 1929) Affirmed 64 F. (2d) 1016 (C. C. A. 6th, 1933).

These cases involved claims for refund under other but similar statutes on the question as to whether a claim

for refund submitted to the Commissioner must be substantiated by evidence. The authority for analogy to the latter is found in the Congressional Committee Report on the Revenue Act of 1936 (C. B. 1939-1, Part 2, pp. 699-700).

The instant decision is also in conflict with the following decision of the United States District Court in the Sixth Circuit involving the same issue:

Fidelity & Columbia Trust Co. v. Lucas, 7 F.
(2d) 146 (D. C. Ky., 1925).

3. The Circuit Court of Appeals for the Seventh Circuit has decided an important and substantial question of federal law which has not been and should be settled by the Supreme Court.

Respondent had moved to dismiss the complaint on the ground, in part, that the District Court "is without jurisdiction to hear and determine upon the merits of the matters alleged in the complaint * * *" (R. p. 4) for the reason that no evidence had been submitted to the Commissioner of Internal Revenue. The Circuit Court, without ruling specifically on the question of jurisdiction, has ruled, in effect, by its affirmance of the dismissal of the complaint, that the District Court has no jurisdiction of the action. This question of jurisdiction of the District Court, it is submitted, is of utmost importance and should be settled by the Supreme Court.

Further there are many hundreds of cases such as the instant one still pending in the Federal District Courts. Recovery will be denied claimant in some circuits for the same reason that recovery was here denied, whereas, other claimants in similar factual situations, but in different circuits, will recover. If certiorari is here granted and the ultimate guiding rule in this type of case is an-

nounced by the Supreme Court, there will be uniformity of decision in the several circuits; thus, there will be no advantage afforded to some claimants solely by reason of their geographical location; further, many claimants will then be in a position to determine whether to proceed with or discontinue their actions, with a resultant saving of time and expense for the courts, counsel and litigants.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this court, directed to the Circuit Court of Appeals for the Seventh Circuit, commanding said Court to certify and send to this court a full and complete transcript of the record and of the proceedings of the said Circuit Court had in the case numbered and entitled on its docket No. 8344, *The 18th Street Leader Stores, Inc., Appellant v. The United States of America, Appellee*, to the end that this cause may be reviewed and determined by this court as provided for by the statutes of the United States; and that the judgment herein of said Circuit Court be reversed by this Court, and for such further relief as to this Court may seem proper.

DAVID J. SHORB,
Counsel for Petitioner.

Dated: July 10, 1944.